LOW SON SIANG

v.

LEE KIM YONG

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-863-1998]
7 SEPTEMBER 1998

COMPANY LAW: *Meetings - Calling of meetings - Power of court to direct holding of meetings - When can court direct meetings to be held - No quorum due to failure of member to attend - Whether court can direct meeting to be held - Whether power extends to calling directors' meeting - Companies Act 1965, s. 150*

COMPANY LAW: *Meetings - Appointment of proxies - Right of members to appoint proxies - How to appoint a proxy - Whether appointment revocable - How to revoke an appointed proxy*

The plaintiff and the defendant were the only two shareholders of a company. Further to investigating an allegation of criminal breach of trust made against the defendant, an extraordinary general meeting was convened. However, the said meeting could not proceed since the defendant failed to attend the same thereby rendering the meeting inquorate. The plaintiff, contending that the failure to conduct the said meeting would prevent the company from carrying out its functions, grounded an application on s. 150 of the Companies Act 1965 ('the Act') and claimed for orders that, *inter alia*, he be at liberty to call an extraordinary general meeting and that if the defendant failed to attend the said meeting, he by himself attending the meeting shall be deemed to constitute a meeting.

Held:

[1] When confronted with an application grounded on s. 150 of the Act, the first question to pose is whether the desired meeting can be conducted. The onus is on the plaintiff to show that it is impracticable to call for a meeting of the company in any manner whatsoever or even to conduct the meeting in the manner prescribed by the articles of association of the company.

[2] The court has an inherent power to direct that meetings of members or classes of members be held. It is common for a court to direct the holding of a meeting when it is practically impossible to hold a general meeting because of the persistent absence of a quorum at that meeting or the

absence of a quorum at a general meeting resolved by the applicant or when an action has been instituted in the company's name by a member and the court needs to ascertain whether the majority of the members wish the action to be continued or otherwise.

[3] The court is not prevented from exercising its discretion to call a general meeting or a class meeting or an extraordinary general meeting like in the present case when it is impracticable to call it by any other means.

Per curiam:

[1] The power under s. 150 of the Act does not extend to calling meetings of directors.

[2] Every member of a company who is entitled to attend and vote at any general meeting or at an extraordinary general meeting has the right to appoint a proxy to attend and vote on his behalf. The articles of association usually sets out the relevant form to appoint a proxy, otherwise a written appointment will suffice.

[3] The appointment of a proxy, unless made irrevocable for valuable consideration, is revocable at any time by the member who appoints him. The revocation must conform to the provisions in the articles. Automatic revocation will occur upon the appointing member's untimely death, the happening of a bankruptcy or when the appointing member becomes inflicted with a mental incapacity that renders his mind unsound. But once the proxy has voted, the person who appoints the proxy will be bound.

[4] A proxy paper signed in blank and handed over to a person in authority who then fills up the blank is effective if the blank has been properly filled up when the proxy paper is deposited or used.

[Orders granted.]

Cases referred to:

Daimler Co Ltd v. Continental Tyre and Rubber Co (Great Britain) [1916] 2 AC 307 ***(refd)***

Ernest v. Loma Gold Mines [1897] 1 Ch 1 ***(refd)***

Fruit and Vegetable Growers' Association Ltd v. Kekewich [1912] 2 Ch 52 ***(aff)***

Isaacs v. Chapman [1915] 32 TLR 183 ***(refd)***

Leong Ah Hong v. Hup Seng Co Ltd [1963] MLJ 164 ***(cit)***

Opera Photographic, Re [1989] 5 BCC 601 ***(refd)***

Re El Sombrero Ltd [1958] 3 All ER 1 ***(refd)***

Re Paris Skating Rink Co [1877] 6 Ch D 731 ***(foll)***

Re Sticky Fingers Restaurant Ltd [1991] BBC 754 ***(refd)***

Re Whitchurch Insurance Consultants Ltd [1993] BCLC 1359 ***(aff)***

Sadgrove v. Bryden [1907] 1 Ch 318 ***(refd)***
Spiller v. Mayo (Rhodesia) etc, Co [1926] WN 78 ***(refd)***
Tay Say Geok v. Tay Ek Seng Co Sdn Bhd [1974] 1 MLJ 70 ***(aff)***

Legislation referred to:
Companies Act 1965, s. 150
Companies Act 1948 [UK], s. 135

Other source referred to:
Current Law Year Book 1992, Sweet & Maxwell, 1993, p 90, para 380

For the plaintiff - Poi Tzse Meng; M/s Poi Tzse Meng & Co
For the defendant - Ong Kow Meng; M/s KM Ong, Lee & Co

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

This was an application by the plaintiff for the following orders:

(1) That the plaintiff Low Son Siang @ Loo Soon Siong be at liberty to call an extra-ordinary General Meeting one week from the date of the order herein.

(2) That one week's notice of such extra-ordinary General Meeting be given to the defendant or his solicitors.

(3) A direction from the court that if the defendant fails to attend the said meeting, the plaintiff by himself attending the meeting shall be deemed to constitute a meeting.

(4) Costs.

(5) Any other suitable relief.

That application was in encl. 4 and the grounds in support thereof can be seen in encl. 3 where the plaintiff himself affirmed the affidavit on 15 May 1998 which was filed on 30 May 1998. The plaintiff deposed that he was a director and chairman of a company known as Delightful Vision Sdn Bhd with a postal address at no: 29A, Jalan Dedap 8, Taman Johor Jaya, 81100 Johor Bahru. In the month of March 1998 the plaintiff requested the secretary of the company to convene an extra-ordinary general meeting of the company for the purpose of investigating the criminal breach of trust committed by the defendant and if need be to remove the defendant as the company director and managing director of the company. By a notice dated 31 March 1998, the defendant and his solicitors were informed that an extra-ordinary general meeting will be held on 7 May 1998 at no: 2F, Jalan Giam, Taman Majidee

(Off Jalan Tebrau), 80250 Johor Bahru at 10am. But unfortunately on the scheduled date the extra-ordinary general meeting ["EOGM"] did not proceed as planned for the simple reason that the defendant failed to attend and the meeting was inquorate. It was deposed that if the defendant refused to attend the EOGM the company will not be able to function. The plaintiff and the defendant held equal shares in the company – each having 40,000 shares to their credit. In the month of March 1998, the plaintiff took over the duties of the defendant but the latter interfered in running the affairs of the company. The defendant acted to the detriment of the company by:

(a) portraying to the business community a bad image of the company causing it to suffer losses; and

(b) being the holder of a licence to sell liquor, the defendant had written a letter to the District Officer, Johor Bahru and expressed the desire to suspend the licence and thereby affect the business of the company.

It was also deposed that the defendant failed to maintain the accounts of the company and that the sole purpose of the defendant writing to the district officer, Johor Bahru was to force the plaintiff to purchase the defendant's shares at RM120,000. It was an arm twisting method aimed solely to undermine the plaintiff. The defendant too had the audacity to seize important documents belonging to the company through third parties and being aggrieved the plaintiff had since lodged a police report *vide* Plentong report number 5542/98.

It is interesting to note that the company was running a lucrative karaoke business, which appears to have mushroomed everywhere in good old Johor Bahru. Liquor and karaoke must be the perfect combination to run a lucrative business these days.

The defendant, initially, resisted the application. But the affidavit-in-reply of the defendant in encl. 8 that was affirmed on 16 July 1998 particularly para. 14 thereof somehow agreed to the plaintiff's application in encl. 4. That would certainly be the end of the matter. However, since the application in encl. 4 was grounded on s. 150 of the Companies Act 1965, I felt constrained to put my thoughts on paper. That section enacts as follows:

150. If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that

> one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

and the corresponding United Kingdom section would be s. 135 of the Companies Act 1948. Wynn-Parry J in *Re El Sombrero, Ltd* [1958] 3 All ER 1 at p. 4 of the report had this to say of the section:

> The first point of law which arises involves the construction of section 135(1), the examination being directed to consider the scope of the phrase:
>
> > If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the articles or this Act ... .
>
> It is to be observed that the sub-section opens with the words 'If for any reason', and, therefore, it follows that the sub-section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words being 'it is impracticable to call a meeting of a company', the question arises, what is the scope of the word 'impracticable'? It is conceded (certainly it was conceded below) that the word 'impracticable' is more limited than the word 'impossible', and it appears to me that the question necessarily raised by the introduction of the word 'impracticable' is merely this: Examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. On the face of section 135(1), there is no express limitation which would operate to give those words 'is impracticable' any less meaning than that which I have stated, and I can find no good reason in the arguments which have been addressed to me on behalf of the respondents for qualifying in any way the force of the word 'impracticable' or the interpretation which I have placed on it, and, therefore, on that point I am in favour of the applicant.

His Lordship continued further in the same page in these words:

> I can find nothing in the language of the sub-section which would even indicate that the jurisdiction can be invoked only if, at least, there is no opposition, and I hold that, on the true construction of the sub-section, there is nothing to prevent the court intervening in a proper case and where the application before it is opposed by the other shareholders.

Now, when confronted with an application like encl. 4 grounded on s. 150 of the Companies Act 1965, the first and foremost question to pose would be: Whether the desired EOGM can be conducted? Here, surely the onus would be on the plaintiff to show to this court that it was impracticable to call for a meeting of the company in any manner whatsoever or even to conduct the

meeting in the manner as prescribed by the Articles of the company (*Leong Ah Hong v. Hup Seng Co Ltd* [1963] MLJ 164, 165). Article 46 of the Articles of Association of the company states that:

> No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person shall be a quorum. For the purpose of this regulation 'member' includes a person attending as a proxy or as representing a corporation which is a member.

and clearly "two members present in person shall be a quorum". Here, the defendant refused to attend the EOGM and surely this court has the discretion to call for such EOGM with a quorum of one as sought for by the plaintiff in encl. 4. After all Mervyn Davies J in *Re Sticky Fingers Restaurant Ltd* [1991] BBC 754 exercised his discretion under the equivalent section of the UK Companies Act 1948 to call a meeting with a quorum of one where the other recalcitrant member refused to attend the meeting. A summary of the case of *Re Sticky Fingers Restaurant Ltd* appeared in the *Current Law Year Book 1992*, a 1993 edition by Sweet and Maxwell, at p. 90 of para. 380, and I shall now produce them verbatim:

> The existence of a subsisting section 459 petition did not preclude the court from ordering a shareholders' meeting to be properly constituted by the attendance of one shareholder only under section 371 of the Companies Act 1985.
>
> W owned 66 shares in and was a director of the company, which traded as a restaurant business. M owned 34 shares in the company and was also a director of it. There were no other shareholders or directors. W and M fell out over the running of the company's business. In consequence on March 8, 1991, M presented a petition under section 459 of the Companies Act 1985 seeking an order that W buy his shares at a fair value. On March 12, 1991, W commenced proceedings seeking an account, injunctions and damages based on allegations of conversion of the company's assets and breach of fiduciary duty. In April 1991, W sought M's co-operation in the appointment of two additional directors and asked M to resign as a director. At the ensuing board meeting M failed to attend so that the meeting was inquorate. An extraordinary general meeting was held subsequently, which M again failed to attend, so that it was inquorate. W applied to the court for an order under section 371 of the 1985 Act, directing the holding of a general meeting at which the attendance of one shareholder would constitute a quorum. W contended that the board was deadlocked, with the result that there was no effective management of the company's business. M contended that the business was being adequately managed by the restaurant manageress and the person authorised by W and M as the sole signatory of the company's bank account. He also contended that if the order sought was granted, he would be removed from the board by W, with the consequence that his section 459 petition would be prejudiced.

Held, that (1) there was no effective management of the company by its board of directors. There were outstanding matters such as approval of the company's accounts that could not be dealt with by the restaurant manageress; (2) it was not proper to use section 371 to indirectly secure the removal of a director while a section 459 petition was pending; (3) in the circumstances, the order sought would be granted subject to the condition that any director appointed at the meeting would not be able to take up that office without first giving an undertaking not to vote in favour of any resolution to remove M as a director pending the outcome of his section 459 petition.

Relying on the *Current Law Year Book 1992* by Sweet and Maxwell was quite a worthwhile venture. It's 1990 edition shows a case of *Opera Photographic, Re* [1989] 5 BCC 601 where the short summary clearly says:

Quorum provisions cannot be regarded as conferring a form of veto on a minority party where a situation of deadlock exists.

P held 51 of one hundred shares; D held 49. P and D were the only directors. P requisitioned a meeting of the company to remove D. D refused to attend, rendering the meeting inquorate. P sought an order convening a meeting at which one member would constitute a quorum.

Held, granting the order, that the quorum provisions could not be regarded as conferring some form of veto on D. There was deadlock and P had the statutory right to remove D as a director (*Ebrahimi v. Westbourne Galleries* [1971] CLY 393 and *Sombrero, Re* [1958] CLY 430 considered).

Re Paris Skating Rink Co. [1877] 6 Ch. D 731 lays down the proposition that the court has an inherent power to direct that meetings of members or classes of members shall be held. It is common for the courts to direct the holding of a meeting when it is practically impossible to hold a general meeting because of:

(1) the persistent absence of a quorum at that meeting; or

(2) the absence of a quorum at a general meeting resolved by the applicant (*Fruit and Vegetable Growers' Association Ltd v. Kekewich* [1912] 2 Ch 52); or

(3) when an action has been instituted in the company's name by a member and the court needs to ascertain whether the majority of the members wish for the action to be continued or otherwise.

That the court has the discretion to order an EOGM is clear from the authorities. *Re Whitchurch Insurance Consultants Ltd* [1993] BCLC 1359; [1994] BCC 51 gives the court a wide discretion whether to direct that a general meeting or a class meeting shall be held when the applicant is a

member of the company or a member of the class concerned. The court too is not prevented from exercising its discretion to call a general meeting or a class meeting or an EOGM like the present case when it is impracticable to call it by any other means. But it must be remembered that the power under s. 150 of the Companies Act 1965 does not extend to calling meetings of directors (*Tay Say Geok v. Tay Ek Seng Co Sdn Bhd* [1974] 1 MLJ 70).

Article 46 of the Articles of the company adverted to the word "proxy" and the proxy form was annexed in encl. 3 as exh. "LSS 2". It must be remembered that every member of a company who is entitled to attend and vote at any general meeting or at an EOGM has the right to appoint a proxy to attend and vote on his behalf. The Articles of Association usually sets out the relevant form to appoint a proxy, otherwise a written appointment would suffice (*Isaacs v. Chapman* [1915] 32 TLR 183). The appointment of a proxy is revocable at any time by the member who appoints him and automatic revocation would occur upon the member's untimely death, the happening of a bankruptcy, when the member becomes inflicted with a mental incapacity as to make him of unsound mind. But once the proxy has voted, the person who appoints the proxy would be bound. On the strength of *Daimler Co Ltd v. Continental Tyre and Rubber Co. (Great Britain)* [1916] 2 AC 307, 325 it is sufficient if at the adjourned meeting one member is present in person and one by proxy. A proxy paper signed in blank and handed over to a person in authority who then fills up the blank is effective if the blank has been properly filled up when the proxy paper is deposited or used (*Sadgrove v. Bryden* [1907] 1 Ch. 318 and *Ernest v. Loma Gold Mines* [1897] 1 Ch. 1). It must be emphasised that the appointment of a proxy, unless made irrevocable for valuable consideration, can be revoked. But the revocation must conform to the provisions in the Articles (*Spiller v. Mayo (Rhodesia), etc, Co.* [1926] WN 78). These are general observations that the plaintiff should be made aware of. The defendant too must take note of this.

It was a foregone conclusion for the defendant. I unhesitantly gave the orders as sought for in encl. 4, paras. 1, 2, 3 and 4 thereof.